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Sun West Bank

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

PROGRESSIVE CASUALTY  
INSURANCE COMPANY,

Plaintiff,

v.

JACKIE K. DELANEY; LARRY E.  
CARTER; MARK A. STOUT;  
KENNETH TEMPLETON; JOHN

Case No. 2:11-cv-00678-LRH-PAL

JOINT PROPOSED ESI  
PROTOCOL

1 SHIVELY; STEPHEN C. KALB; )  
 2 JEROME F. SNYDER; HUGH )  
 3 TEMPLETON; and RICK )  
 4 DRESCHLER, )  
 Defendants. )

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5  
 6 Plaintiff and Defendants have conferred regarding the  
 7 production of electronically stored information in their possession,  
 8 custody, or control ("ESI"), agree to the following, and respectfully move  
 9 the Court to enter an Order approving the same.

10 1. As used herein, "Plaintiff" or "Progressive" means  
 11 Progressive Casualty Insurance Company, "FDIC-R" means the FDIC in its  
 12 capacity as Receiver of Sun West Bank ("Sun West" or the "Bank"), and "Ds  
 13 & Os" means Defendants Jackie K. Delaney, Larry E. Carter, Mark A. Stout,  
 14 Kenneth Templeton, John Shively, Stephen C. Kalb, Jerome F. Snyder,  
 15 Hugh Templeton, and Rick Dreschler. As used herein, the words "Party" or  
 16 "Parties" include Plaintiff, FDIC-R, and the Ds & Os.

17 2. This Protocol, including the provisions set forth in Exhibit  
 18 A, applies to the ESI provisions of Fed. R. Civ. P. 16, 26, 33, 34, and 37.  
 19 Insofar as it relates to ESI, this Protocol also applies to Fed. R. Civ. P. 45, if  
 20 agreed to by the recipient of any subpoena issued pursuant to that rule, in  
 21 all instances in which the provisions of Fed. R. Civ. P. 45 are the same as, or  
 22 substantially similar to, the provisions of Fed. R. Civ. P. 16, 26, 33, 34, or 37.  
 23 Nothing contained herein modifies Fed. R. Civ. P. 45 and, specifically, the  
 24 provision of Rule 45(c)(2)(B) regarding the effect of a written objection to  
 25 inspection or copying of any or all of the designated materials or premises.  
 26 The Parties agree that this Protocol will serve as a guideline for any  
 27 subpoena for documents issued to ABA Insurance Services Inc. ("ABAIS"),  
 28 Progressive's managing general agent, in this matter. The Parties shall

1 meet and confer regarding the appropriateness of this Protocol with respect  
2 to any subpoena to ABAIS. Nothing in this Protocol shall be deemed to  
3 constitute a waiver of any objections ABAIS may have with respect to any  
4 such subpoena. Nothing in this Protocol shall be deemed to prevent a  
5 Party from seeking the Court's intervention with respect to any issues that  
6 may arise regarding the application of this Protocol to a subpoena issued to  
7 ABAIS and/or any objections ABAIS may have with respect to any such  
8 subpoena if the Parties are unable to resolve any such issues or objections  
9 without the Court's assistance. Likewise, nothing in this Protocol shall be  
10 deemed to prevent any other Party from opposing any relief sought from  
11 the Court.

12 3. In this Protocol, the following terms have the following  
13 meanings:

14 A. "Metadata" means: (i) information embedded in a  
15 Native File, including but not limited to the information identified in  
16 Exhibit A hereto, that is not ordinarily viewable or printable from the  
17 application that generated, edited, or modified such Native File; and (ii)  
18 information generated automatically by the operation of a computer or  
19 other information technology system when a Native File is created,  
20 modified, transmitted, deleted, or otherwise manipulated by a user of such  
21 system. Metadata is a subset of ESI.

22 B. "Native File(s)" means ESI in the electronic format  
23 of the software application in which such ESI is normally created, viewed,  
24 and/or modified. Native Files are a subset of ESI. Native Files include, but  
25 are not limited to, the files identified in Exhibit A.

26 C. "Static Image(s)" means a representation of ESI  
27 produced by converting a Native File, including but not limited to the  
28 types of files identified in Exhibit A, into a standard image format capable

1 of being viewed and printed on standard computer systems. In the absence  
2 of agreement of the Parties or order of Court, a Static Image, when  
3 provided, should be provided in 300 dpi resolution, single-page black and  
4 white CCITT Group IV Tagged Image File Format (TIFF or .TIF files). If a  
5 TIFF or .TIF file cannot be created, then the Static Image should be  
6 provided in Portable Document Format (PDF).

7           4. Notwithstanding the protocols set forth in this Protocol,  
8 each Party shall produce any and all ESI it intends to rely upon in support  
9 of any claim or defense with respect to this matter.

10           5. In accordance with Federal Rule of Evidence 502(d), to  
11 the extent any Party or subpoena recipient discloses a communication or  
12 information covered by the attorney-client privilege, work-product  
13 doctrine, or any other applicable privilege(s) or protection(s) (collectively  
14 "Privilege") that Privilege is not waived by disclosure connected with the  
15 litigation pending before the Court, and the disclosure is also not a waiver  
16 in any other federal or state proceeding. Upon discovery by any Party or  
17 recipient of a subpoena that produces documents subject to this Protocol  
18 that it inadvertently disclosed materials it believes to be protected by  
19 Privilege, that Party or subpoena recipient shall promptly notify all Parties  
20 or their counsel in writing of the disclosure, identify the document that  
21 contains or consists of material believed to be Privileged, and immediately  
22 take steps to prevent further disclosure of such material. The provisions of  
23 Federal Rule of Civil Procedure 26(b)(5)(B) shall govern the Parties and any  
24 subpoena recipient that produces documents subject to this Protocol with  
25 respect to any such material. Similarly, if any Party receives ESI from a  
26 producing Party or subpoena recipient that it reasonably believes the  
27 producing Party or subpoena recipient may have inadvertently produced  
28 because it clearly contains information that may be protected by the

1 attorney-client privilege, work-product doctrine, or any other privileges or  
2 protections, the receiving Party shall notify the producing Party or  
3 subpoena recipient that it believes that such ESI may have been  
4 inadvertently produced. The provisions of Federal Rule of Civil Procedure  
5 26(b)(5)(B) shall govern the Parties and any subpoena recipients that  
6 produce documents subject to this Protocol with respect to any such  
7 material. To the extent the Parties or subpoena recipients disagree  
8 regarding the application of these principles to any such material, or  
9 challenge the privileged nature of such material, the receiving Parties shall  
10 not make use of the material in question until the matter is resolved by the  
11 Court.

12 6. Nothing in this Protocol requires Progressive, FDIC-R, or  
13 the Ds & Os to produce again information that was produced before this  
14 action was commenced and/or before this Protocol has been entered by the  
15 Court. The Parties reserve the right to address how to deal with any  
16 productions made before the action commenced.

17 7. The Parties have discussed whether the Party receiving  
18 ESI should be required to pay to the Party producing ESI six cents (\$0.06)  
19 per Static Image for all ESI produced in Static Image format. The Parties  
20 have agreed to defer resolution of this issue until a later date. In the event  
21 that the Parties are unable to reach agreement regarding this issue, all  
22 Parties reserve the right to raise this issue with the Court if they deem it to  
23 be necessary. Moreover, nothing in this Protocol shall be deemed to  
24 constitute a waiver of any Party's right to do so or a waiver of any Party's  
25 right to contest any such effort. Other than the six cents (\$0.06) per page  
26 addressed in this Paragraph, the Parties agree that all other costs associated  
27 with the production of ESI shall be borne by the producing Party unless  
28 otherwise specified in this Protocol.

9. The Parties shall exchange a list of electronic data sources that will be searched for relevant ESI and a list of all custodians whose electronic files will be searched for relevant ESI. Absent agreement among the Parties otherwise, all searches shall be run against all electronic data sources and custodians' files disclosed by the producing Party. In the event a specific search for ESI will be run against only certain discrete data sources or a subset of custodians' files, then the Parties shall exchange a list of the discrete data sources and/or the subset of custodians' files that will be searched. If a Party contends the production of materials sought from one or more custodians is unduly burdensome or that the list of custodians whose electronic files will be searched is too broad or too narrow, the Parties agree to meet and confer to attempt to resolve the issue. Nothing in this Protocol shall prevent a Party from seeking the Court's intervention with respect to any such issue if the Parties are unable to resolve it themselves or from preventing any other Party from opposing any relief sought.

10. Progressive represents it is in possession, custody, or control of the following categories of ESI: (1) Email; (2) General Documents; (3) Website Documents; and (4) Progress Documents. "General Documents" consists of all electronic documents that may include relevant ESI not encompassed solely in categories (1), (3), or (4). In addition to the foregoing, Progressive has certain ESI stored on backup tapes ("Backup



1 Documents"). Upon restoration from backup, Backup Documents also  
2 would be in Progressive's possession. Backup Documents are addressed in  
3 Paragraph 17 below. Progressive represents that, to the best of its  
4 knowledge, this is a full, complete, and accurate listing of all categories of  
5 ESI from which materials relevant to this action may be retrieved. FDIC-R  
6 and the Ds & Os reserve the right to seek additional ESI in the possession,  
7 custody, or control of Progressive or ABAIS, and nothing contained herein  
8 shall be deemed to constitute a waiver of their right to do so. Progressive  
9 and ABAIS reserve the right to object to any efforts by FDIC-R or the Ds &  
10 Os to seek any such additional ESI, to the extent it exists.

11 11. Subject to the terms of this Protocol, including, but not  
12 limited to, Paragraph 9, and the Confidentiality Agreement and Stipulated  
13 Protective Order in this matter (Docket No. 63), and pursuant to an Order  
14 of this Court which shall be deemed made by approval of this Protocol,  
15 Progressive shall produce relevant, non-privileged documents in categories  
16 (1) and (2), collectively referred to as the "Progressive Searchable ESI," in  
17 accordance with the procedures set forth in this Protocol and in the format  
18 specified in Exhibit A hereto. Progressive shall produce relevant, non-  
19 privileged ESI in category (3) as specifically addressed in Paragraph 15  
20 below. Progressive shall produce relevant, non-privileged ESI in category  
21 (4) as specifically addressed in Paragraph 16 below.

22 12. The Parties shall collectively agree upon a reasonable set  
23 of search terms to run across the processed Progressive Searchable ESI. If  
24 the Parties are unable to agree upon search terms after conferring in good  
25 faith, any Party may raise the issue with the Court by motion. In order to  
26 facilitate the good faith negotiation of search terms among the Parties, with  
27 respect to any search term requested by FDIC-R or the Ds & Os but  
28 objected to by Progressive on the grounds that it is overly broad or unduly

1 burdensome, Progressive shall provide search term hit reports to FDIC-R  
2 and the Ds & Os which identify the number of unique documents that hit  
3 upon each identified search term requested by FDIC-R or the Ds & Os and  
4 objected to by Progressive. This search term process will be iterative and  
5 therefore might require several iterations of revised search terms and hit  
6 reports. If requested by FDIC-R or the Ds & Os with respect to any search  
7 term to which Progressive objects on the grounds that it is overly broad or  
8 unduly burdensome, Progressive shall also produce statistically random  
9 subsets of search-term-positive, non-privileged data for FDIC-R and the Ds  
10 & Os to assess the utility of the search terms prior to final agreement on  
11 search terms ("test production"). The Parties shall meet and confer to  
12 determine the specific parameters of the test production, including, but not  
13 limited to, the sample size and data sources from which the test production  
14 will be derived. The Parties reserve the right to seek the Court's  
15 intervention with respect to such issues if they are unable to reach  
16 agreement. To the extent there is a dispute among the Parties regarding  
17 documents retrieved by the search terms that Progressive does not  
18 produce, or an issue arises regarding the timeliness of Progressive  
19 producing the documents, the Parties shall meet and confer and determine  
20 whether there are ways to resolve the dispute without Court intervention.  
21 In the event that the Parties are unable to reach agreement regarding this  
22 issue, all Parties reserve the right to raise the issue with the Court.  
23 Progressive shall also provide FDIC-R and the Ds & Os with an exception  
24 report listing any data that could not be searched or processed ("Exception  
25 Documents"). The report shall include, without limitation, the file  
26 extension for each Exception Document contained in the report.

27 13. After the Parties have agreed upon search terms or  
28 established search terms with the assistance of the Court, Progressive shall



1 apply the search terms to the documents in categories (1) and (2), review  
2 the documents retrieved, and produce to FDIC-R and the Ds & Os, at its  
3 option, either all non-privileged documents captured by the agreed-upon  
4 search terms or all non-privileged documents captured by the agreed-upon  
5 search terms that are responsive to FDIC-R's or the Ds' & Os' document  
6 requests and relevant pursuant to the Federal Rules of Civil Procedure,  
7 subject to any proper objections Progressive may have to such requests.  
8 Progressive shall advise FDIC-R and the Ds & Os which option it selects.  
9 FDIC-R and the Ds & Os agree that Progressive need not review the  
10 documents captured by the agreed-upon search terms for relevance or  
11 responsiveness prior to production but that Progressive may do so at its  
12 option. Progressive shall advise FDIC-R and the Ds & Os whether it has  
13 reviewed documents for relevance or responsiveness prior to production  
14 and, if so, whether it has withheld documents on the grounds that they are  
15 not relevant or responsive. Progressive shall produce documents in the  
16 format specified in Exhibit A. The Parties agree that Progressive will, as  
17 practicable, produce documents on a rolling basis and will produce  
18 documents as soon as practicable after the Parties have agreed upon search  
19 terms or established search terms with the assistance of the Court. To the  
20 extent Progressive does not produce documents retrieved by the agreed-  
21 upon search terms based on its determination that such documents are not  
22 relevant or an issue arises regarding the timeliness of Progressive's  
23 production, the Parties shall meet and confer and determine whether there  
24 are ways to resolve the issue without Court intervention. In the event that  
25 the Parties are unable to reach agreement regarding this issue, all Parties  
26 reserve the right to raise the issue with the Court.

27 14. The Parties may make multiple, reasonable requests for  
28 production of ESI utilizing this process. In the event the producing party

1 believes a subsequent request is not reasonably calculated to lead to the  
2 discovery of admissible evidence and objects to the subsequent request,  
3 then the burden shall be on the requesting party to demonstrate that such  
4 subsequent request is reasonable and necessary.

5           15. Progressive represents that ESI in category (3), Website  
6 Documents, consists of: (a) the website located at <http://www.abais.com>  
7 as of August 20, 2012 (the "ABAIS Website"); (b) previous iterations of the  
8 ABAIS Website, if any, maintained by ABAIS; (c) the website located at  
9 <http://banks.progressive.com> as of March 8, 2013 (the "Progressive  
10 Website"); and (d) previous iterations of the Progressive Website, if any,  
11 maintained by ABAIS or Progressive. Progressive shall produce the ABAIS  
12 Website (item (a)) and the Progressive Website (item (c)) in a form that will  
13 allow them to be viewed in their entirety in a standard web browser, i.e.,  
14 Internet Explorer, Firefox, Chrome. Progressive shall produce previous  
15 iterations of the ABAIS Website (item (b)), if any, and previous iterations of  
16 the Progressive Website (item (d)), if any, in this same form where  
17 available and, when not available in a readable electronic format, by  
18 printing out copies and producing them in accordance with the procedures  
19 for producing physical documents agreed to by the Parties. Progressive  
20 shall produce all documents within category (3) as soon as practicable after  
21 execution of this Protocol by all Parties.

22           16. Progressive represents that ESI in category (4), Progress  
23 Documents, consists of documents maintained in a proprietary computer  
24 system utilized by Progressive, commonly referred to as "Progress."  
25 Among other things, Progress contains information also contained in  
26 physical copies of Progressive's claim and underwriting files. Progressive  
27 represents that ESI stored in Progress is not amenable to production as ESI  
28 in accordance with the terms of this Protocol. Therefore, Progressive shall

1 produce all relevant, non-privileged documents and information stored in  
2 Progress, that it is not otherwise producing as part of its production of  
3 physical documents, in a manner that most accurately reflects the  
4 appearance and content of such documents when viewed using the  
5 Progress software. At the time it produces such documents, Progressive  
6 shall provide a description of the manner in which it selected or procured  
7 them and of the ways in which the appearance or content of the documents  
8 as produced differs from the appearance or content of the documents when  
9 viewed using Progress. Nothing in this paragraph shall be deemed to  
10 constitute acknowledgement or agreement by FDIC-R or the Ds & Os  
11 concerning Progressive's representation that ESI stored in Progress is not  
12 amenable to production as ESI in accordance with the terms of this  
13 Protocol. Further, the Parties reserve the right to re-address the  
14 methodology of how ESI in this category is produced in the event it can be  
15 produced in its electronic format. In the event that the Parties are unable to  
16 reach agreement regarding this issue, all Parties reserve the right to raise  
17 this issue with the Court if they deem it to be necessary. Moreover,  
18 nothing in this Protocol shall be deemed to constitute a waiver of any  
19 Party's right to do so or a waiver of any Party's right to contest any such  
20 effort. Progressive shall produce all documents within category (4) as soon  
21 as practicable after execution of this Protocol by all Parties.

22           17. Progressive represents that Backup Documents consist of  
23 documents maintained by Progressive on backup tapes. Progressive shall  
24 provide to FDIC-R and the Ds & Os a description of ESI maintained solely  
25 in the form of Backup Documents. Progressive contends that Backup  
26 Documents are not readily available and that the production of Backup  
27 Documents by Progressive would be unduly burdensome and would  
28 require the expenditure of significant time and resources. For that reason,

1 Progressive does not intend to produce Backup Documents. In the event  
2 that FDIC-R or the Ds & Os believe that Progressive should produce such  
3 documents, they may file a motion with the Court seeking an order  
4 compelling such production. Nothing contained herein shall be deemed to  
5 constitute a waiver of their right to do so or a waiver of Progressive's right  
6 to contest any such motion.

7           18. Progressive has converted, or will convert, to electronic  
8 format, ESI, relevant documents that exist solely in physical, hard-copy  
9 format. With respect to hard-copy documents Progressive converted to ESI  
10 prior to the execution of this Protocol in this matter, such documents were  
11 subject to an Optical Character Recognition ("OCR") process when they  
12 were collected. To the extent not previously produced by Progressive prior  
13 to execution of this Protocol, Progressive shall produce such relevant, non-  
14 privileged ESI in the format specified in Exhibit A along with metadata  
15 created when the hard-copy documents were converted to ESI, if any. For  
16 purposes of this paragraph, metadata means the following: (1) Custodian  
17 (Name of Custodian from whom the document was collected); (2) Author;  
18 (3) Doc Title (Title of file or email subject); (4) Doc Date (Visible data on  
19 loose files or Sent Date on emails); (5) Doc Type; (6) Page Count; (7) Bates  
20 Begin (Beginning Production Number); and (8) Bates End (Ending  
21 Production Number). Progressive shall not be required to create metadata  
22 with respect to such hard-copy documents that does not presently exist.  
23 The load file shall indicate document breaks. With respect to relevant,  
24 hard-copy documents Progressive has not yet converted to ESI, Progressive  
25 will convert such documents to ESI and shall subject them to an OCR  
26 process. Progressive shall produce such relevant, non-privileged ESI in the  
27 format specified in Exhibit A. The load file shall indicate document breaks,  
28 and, where readily available, the metadata created when the hard-copy

1 documents were converted to ESI. Nothing in this paragraph shall be  
2 deemed to require Progressive to produce again any hard-copy documents  
3 it produced prior to execution of this Protocol, regardless whether its prior  
4 production(s) conformed to the requirements of this Protocol.

5 19. Documents withheld by Progressive on the basis of  
6 privilege, work product, or any other privilege or protection shall be  
7 logged, and Progressive shall provide the log to FDIC-R and the Ds & Os  
8 together with Progressive's ESI production or within thirty (30) days after  
9 its production of the ESI material the privileged documents relate to.

#### 10 FDIC-R ESI

11 20. FDIC-R represents it is in possession, custody, or control  
12 of ESI related to Sun West Bank ("SWB ESI"). The SWB ESI includes the  
13 following databases: (1) S5 Forensic Data; (2) S5 Scanned Documents; (3)  
14 S5 Forensic Data Email; (4) various loan-related databases ( S5 Director  
15 Loan Reports, S5 Laserpro Loan Origination Information, S5 OMS Loan  
16 Info); and (5) network file shares database (S5 Fileshares). A complete list  
17 of available databases is attached hereto as Exhibit B. FDIC-R represents  
18 that, to the best of its knowledge, Exhibit B is a full, complete, and accurate  
19 listing of all categories of ESI from which materials relevant to this action  
20 may be retrieved. As it relates to ESI in the possession or control of FDIC-  
21 R, this Protocol applies only to SWB ESI as defined herein. Progressive and  
22 the Ds & Os reserve the right to seek additional ESI in the possession,  
23 custody, or control of the FDIC and/or FDIC-R, and nothing contained  
24 herein shall be deemed to constitute a waiver of their right to do so. FDIC-  
25 R and the FDIC-Corporate reserve the right to object to any efforts to seek  
26 any such additional ESI, to the extent it exists.

27 21. Subject to the terms of this Protocol, including, but not  
28 limited to, Paragraph 9, and the Confidentiality Agreement and Stipulated



1 Protective Order in this matter (Docket. No. 63), and pursuant to an Order  
2 of the Court which shall be deemed made by approval of this Protocol,  
3 FDIC-R shall produce relevant, non-privileged documents from databases  
4 (1) through (4) in accordance with the procedure set forth in this Protocol  
5 and in the format specified in Exhibit A hereto.

6           22. The Parties shall collectively agree upon a reasonable set  
7 of search terms to run across the processed SWB ESI. If the Parties are  
8 unable to agree upon search terms after conferring in good faith, any Party  
9 may raise the issue with the Court by motion. In order to facilitate the  
10 good faith negotiation of search terms among the Parties, with respect to  
11 any search term requested by Progressive or the Ds & Os but objected to by  
12 FDIC-R on the grounds that it is overly broad or unduly burdensome,  
13 FDIC-R shall provide search term hit reports to Progressive and the Ds &  
14 Os which identify the number of unique documents that hit upon each  
15 identified search term requested by Progressive or the Ds & Os and  
16 objected to by FDIC-R. This search term process will be iterative and  
17 therefore might require several iterations of revised search terms and hit  
18 reports. If requested by Progressive or the Ds & Os with respect to any  
19 search term to which FDIC-R objects on the grounds that it is overly broad  
20 or unduly burdensome, FDIC-R shall also produce statistically random  
21 subsets of search-term-positive, non-privileged data for Progressive and  
22 the Ds & Os to assess the utility of the search terms prior to final agreement  
23 on search terms ("test production"). The Parties shall meet and confer to  
24 determine the specific parameters of the test production, including, but not  
25 limited to, the sample size and data sources from which the test production  
26 will be derived. The Parties reserve the right to seek the Court's  
27 intervention with respect to such issues if they are unable to reach  
28 agreement. FDIC-R shall also provide Progressive and the Ds & Os with



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1 an exception report listing any data that could not be searched or processed  
2 ("Exception Documents"). The report shall include, without limitation, the  
3 file extension for each Exception Document contained in the report.

4           23. After the Parties have agreed upon search terms or  
5 established search terms with the assistance of the Court, FDIC-R shall  
6 apply the search terms to the documents in databases (1) through (4) and,  
7 at its option, may perform an initial review of the documents captured by  
8 the search terms for privilege, responsiveness, or relevance pursuant to the  
9 Federal Rules of Civil Procedure. FDIC-R shall make the documents  
10 available to Progressive and the Ds & Os in an online Relativity database as  
11 soon as practicable after the Parties have agreed upon search terms or  
12 established search terms with the assistance of the Court. FDIC-R shall  
13 advise Progressive and the Ds & Os whether it has reviewed documents for  
14 privilege, responsiveness, or relevance prior to making them available in  
15 Relativity and, if so, whether there are any documents retrieved by the  
16 search terms that FDIC-R is not making available to Progressive and the Ds  
17 & Os based on that review. To the extent there is a dispute among the  
18 Parties regarding documents retrieved by the agreed-upon search terms  
19 that FDIC-R does not make available in Relativity or an issue arises  
20 regarding the timeliness of FDIC-R making documents available in  
21 Relativity, the Parties shall meet and confer and determine whether there  
22 are ways to resolve the dispute without Court intervention. In the event  
23 that the Parties are unable to reach agreement regarding this issue, all  
24 Parties reserve the right to raise the issue with the Court. The Parties agree  
25 that FDIC-R is not required or obligated to conduct a relevancy,  
26 responsiveness, or privilege review on the documents captured by the  
27 agreed-upon search terms prior to making the documents available on  
28 Relativity. The Parties further agree that FDIC-R will not be deemed to

1 have waived any privilege by not conducting a privilege review before  
2 making documents available on Relativity. Once FDIC-R has made  
3 documents available to Progressive and the Ds & Os on Relativity,  
4 Progressive and the Ds & Os will review the documents made available by  
5 FDIC-R and advise FDIC-R which, if any, of those documents they want  
6 FDIC-R to produce to them. FDIC-R shall then produce all such non-  
7 privileged documents identified by Progressive or the Ds & Os in the  
8 format specified in Exhibit A. The Parties agree that FDIC-R will, as  
9 practicable, produce documents on a rolling basis and will produce  
10 documents as soon as practicable after Progressive and/or the Ds & Os  
11 have provided notice to FDIC-R as to which documents they want  
12 produced. In the event that a dispute arises among the Parties regarding  
13 documents identified for production by Progressive and/or the Ds & Os  
14 but withheld by FDIC-R, or an issue arises regarding the timeliness of  
15 FDIC-R's production, the Parties shall meet and confer and determine  
16 whether there are ways to resolve the issue without Court intervention. In  
17 the event that the Parties are unable to reach agreement regarding this  
18 issue, all Parties reserve the right to raise the issue with the Court.

19           24. The Parties may make multiple, reasonable requests for  
20 production of ESI utilizing this process. In the event the producing party  
21 believes a subsequent request is not reasonably calculated to lead to the  
22 discovery of admissible evidence and objects to the subsequent request,  
23 then the burden shall be on the requesting party to demonstrate that such  
24 subsequent request is reasonable and necessary.

25           25. With respect to database (5), the database has not been  
26 processed or OCR'd and is not in a full text searchable form pursuant to  
27 this Protocol. Database (5) is searchable by the current limited metadata of  
28 file name and file path. FDIC-R, after the Parties have agreed-upon search

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1 terms or established search terms with the assistance of the Court, shall  
2 apply the search terms to the metadata available in database (5) and, at its  
3 option, may perform an initial review of the documents captured by the  
4 search terms for privilege, responsiveness, or relevance pursuant to the  
5 Federal Rules of Civil Procedure. As soon as practicable after the Parties  
6 have agreed upon search terms or established search terms with the  
7 assistance of the Court, FDIC-R shall make the documents available to  
8 Progressive and the Ds & Os in an online Relativity database. To the extent  
9 there is a dispute among the Parties regarding documents retrieved by the  
10 agreed-upon search terms that FDIC-R does not make available in  
11 Relativity or an issue arises regarding the timeliness of FDIC-R making  
12 documents available in Relativity, the Parties shall meet and confer and  
13 determine whether there are ways to resolve the dispute without court  
14 intervention. The Parties agree that FDIC-R is not required nor obligated  
15 to conduct a relevancy, responsiveness, or privilege review on the  
16 documents captured by the agreed-upon search terms prior to making the  
17 documents available on Relativity. The Parties further agree that FDIC-R  
18 will not be deemed to have waived any privilege by not conducting a  
19 privilege review before making documents available on Relativity. Once  
20 FDIC-R has made documents available to Progressive and the Ds & Os on  
21 Relativity, Progressive and the Ds & Os will review the documents made  
22 available by FDIC-R and advise FDIC-R which, if any, of those documents  
23 they want FDIC-R to produce to them. FDIC-R shall then produce all such  
24 non-privileged documents identified by Progressive or the Ds & Os in the  
25 format specified in Exhibit A. The Parties agree that FDIC-R will, as  
26 practicable, produce documents on a rolling basis and will produce  
27 documents as soon as practicable after Progressive and/or the Ds & Os  
28 have provided notice to FDIC-R as to which documents they want

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1 produced. In the event that a dispute arises among the Parties regarding  
2 documents identified for production by Progressive and/or the Ds & Os  
3 but withheld by FDIC-R, or an issue arises regarding the timeliness of  
4 FDIC-R's production, the Parties shall meet and confer and determine  
5 whether there are ways to resolve the issue without Court intervention. In  
6 the event that the Parties are unable to reach agreement regarding this  
7 issue, all Parties reserve the right to raise the issue with the Court.  
8 Additionally, upon review of the documents produced, if Progressive or  
9 the Ds & Os determine that they require OCR searches of this database, the  
10 Parties will discuss and attempt to reach an agreement regarding the OCR  
11 processing and production of responsive, non-privileged documents in this  
12 database and the costs involved in doing so. If the Parties are unable to  
13 reach an agreement, the Parties will have the right to address issues  
14 relating to this database with the Court. Nothing contained herein shall be  
15 deemed to constitute acknowledgement or agreement by Progressive or the  
16 Ds & Os that the means of production of documents contained in database  
17 (5) described in this paragraph are sufficient or that FDIC-R is not required  
18 to OCR the documents contained in database (5) at its expense to facilitate  
19 retrieval and production of relevant ESI contained in that database.  
20 Nothing contained herein shall be deemed to constitute a waiver by FDIC-  
21 R of its right to object to any effort by Progressive or the Ds & Os to require  
22 it to OCR the documents contained in database (5).

23           26. Progressive shall pay a monthly fee of \$10 per gigabyte of  
24 ESI hosted on the Relativity database until such time as Progressive  
25 determines that such ESI need no longer be hosted on the Relativity  
26 database and provides written notification of this to FDIC-R and the Ds &  
27 Os. Progressive will pay the monthly fee for the entire month in which it  
28 provides such notification to FDIC-R and the Ds & Os. In no event shall

1 Progressive be required to pay the monthly fee for any period of time after  
2 the month of notification. If one or more of the Ds & Os wish for such ESI  
3 to be hosted on the Relativity database after Progressive has provided such  
4 notification, the Ds & Os shall pay the monthly fee of \$10 per gigabyte  
5 beginning the month after that in which Progressive provides notice to  
6 FDIC-R and the Ds & Os that such ESI need no longer be hosted in  
7 Relativity and continuing until such time as the Ds & Os notify FDIC-R that  
8 such ESI need no longer be hosted on the Relativity database. The Ds & Os  
9 will pay the monthly fee for the entire month in which they provide such  
10 notification to FDIC-R. In no event shall the Ds & Os be required to pay  
11 the monthly fee for any period of time after the month of notification.

12 27. FDIC-R has converted, or will convert, to electronic  
13 format, ESI, relevant documents that exist solely in physical, hard-copy  
14 format. With respect to hard-copy documents FDIC-R converted to ESI  
15 prior to the execution of this Protocol in this matter, such documents were  
16 subject to an Optical Character Recognition ("OCR") process when they  
17 were collected. To the extent not previously produced by FDIC-R prior to  
18 execution of this Protocol, FDIC-R shall produce such relevant, non-  
19 privileged ESI in the format specified in Exhibit A along with metadata  
20 created when the hard-copy documents were converted to ESI, if any. For  
21 purposes of this paragraph, metadata means the following: (1) Custodian  
22 (Name of Custodian from whom the document was collected); (2) Author;  
23 (3) Doc Title (Title of file or email subject); (4) Doc Date (Visible data on  
24 loose files or Sent Date on emails); (5) Doc Type; (6) Page Count; (7) Bates  
25 Begin (Beginning Production Number); and (8) Bates End (Ending  
26 Production Number). FDIC-R shall not be required to create metadata  
27 with respect to such hard-copy documents that does not presently exist.  
28 The load file shall indicate document breaks. With respect to relevant,



1 hard-copy documents FDIC-R has not yet converted to ESI, FDIC-R will  
2 convert such documents to ESI and shall subject them to an OCR process.  
3 FDIC-R shall produce such relevant, non-privileged ESI in the format  
4 specified in Exhibit A. The load file shall indicate document breaks, and,  
5 where readily available, the metadata created when the hard-copy  
6 documents were converted to ESI. Nothing in this paragraph shall be  
7 deemed to require FDIC-R to produce again any hard-copy documents it  
8 produced prior to execution of this Protocol, regardless whether its prior  
9 production(s) conformed to the requirements of this Protocol.

10 28. Documents withheld by FDIC-R on the basis of privilege,  
11 work product, or similar exemption shall be logged, and the log shall be  
12 provided to Progressive and the Ds & Os together with FDIC-R's ESI  
13 production or within 30 days after its production of the ESI material the  
14 privileged documents relate to.

#### 15 Ds' & Os' ESI

16 29. If the Ds & Os are in possession of any ESI that is  
17 responsive to document requests issued to them by Progressive or FDIC-R,  
18 including, without limitation, email and documents of various types,  
19 subject to this Protocol and the Confidentiality Agreement and Stipulated  
20 Protective Order in this matter (Docket. No. 63), and pursuant to an Order  
21 of this Court which shall be deemed made by approval of this Protocol, the  
22 Ds & Os shall produce to FDIC-R and Progressive any such non-privileged  
23 ESI. With respect to any such ESI that the Ds & Os contend is protected  
24 from disclosure by the attorney-client privilege, the work-product doctrine,  
25 or any other applicable privileges or protections, the Ds & Os shall produce  
26 to Progressive and FDIC-R a log identifying any such documents together  
27 with their production of ESI or within 30 days after the production of the  
28 ESI material the privileged documents relate to.



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ORDER

IT IS SO ORDERED that each of the parties and their respective counsel shall be governed by the terms and conditions of the above agreement concerning the production of ESI documents.

UNITED STATES MAGISTRATE JUDGE

DATED: \_\_\_\_\_